90-1656

Supreme Court, U.S.
FILED
APR 22 1991
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1990

SURAJ NARAYAN,

Petitioner,

v.

CHARLES SCULLY, Superintendent,
Greenhaven Correctional Facility,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Whether a procedural bar, applied by the state court to avoid reaching the merits of petitioner's Sixth Amendment claim but which it had never before (or since) applied to bar any other Sixth Amendment claim, and characterized as "not irrational" by the lower courts, can be deemed a state ground "adequate" to preclude habeas corpus relief?

2. Whether a one-hour ban on attorney-client consultations is a "brief recess" within the meaning of *Perry v. Leeke*, when it followed an unobjected-to ban on consultations which lasted almost a full day and continued overnight?

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SURAJ NARAYAN,

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CHARLES SCULLY, Superintendent,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 22, 1991, which affirmed a judgment of the United States District Court for the Eastern District of New York dismissing a petition for a writ of habeas corpus.

Opinions Below

The opinion of the district court dismissing petitioner's habeas corpus action is reported at 741 F.Supp. 377 and is reproduced in the appendix hereto.

The Court of Appeals wrote no opinion and affirmed the ruling below for the reasons stated in the district court's opinion; the order of affirmance is reported at 927 F.2d 594 (table) and is reproduced in the appendix hereto.

Jurisdictional Statement

Petitioner requests this Court to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 22, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1); this petition is being filed within the time permitted by Rule 20.2 of this Court.

Statement of the Case

A. Background

Petitioner was charged with the murder of a young woman in her apartment in the early morning hours of Christmas day, 1974. The prosecution's case was entirely circumstantial, and every shred of its evidence was hotly contested by the defense, which put on its own case. After a four-week trial, the jury convicted petitioner, and he was sentenced to a term of 25 years to life, which he is currently serving.

B. The Trial Judge Bans Attorney-Client Consultations

The last week of trial, beginning on June 14, 1976, saw the petitioner take the stand on his own behalf. The direct examination had progressed for some 62 pages of the transcript when the trial judge declared a brief recess. After the jury was excused, the judge admonished petitioner and his attorney as follows:

> THE COURT: Don't talk to him about his testimony. Don't talk to Mr. Lombardino about your testimony, you understand that?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Step down.

This admonition was repeated at the lunch recess and again at the close of the day's business with petitioner then on the stand undergoing cross-examination.

The following morning (June 15), before either the jury entered the box or petitioner was seated as a witness, defense counsel asked to speak with his client, but the judge continued the consultations ban he had imposed the previous day. The jury was seated, and cross-examination of petitioner resumed.

About an hour or so later, when a recess was declared, defense counsel again sought permission to consult with his client; this request was initially denied as well but the judge relented and finally allowed petitioner to speak with his lawyer.

C: The State Court Appeals

On direct appeal from his judgment of conviction, petitioner argued, *inter alia*, that the trial judge's ban on attorney-client communications violated Sixth and Fourteenth Amendment right-to-counsel guarantees. By a 3-1 vote, the Appellate Division agreed, reversed the conviction "on the law" on the basis of *Geders v. United States*, 425 U.S. 80 (1976) and ordered the case back to trial term for a new trial, making the following findings of fact:

> It is clear from the record, therefore, that the court imposed a barrier between attorney and client lasting approximately 24 hours, and that the defendant and counsel understood the import of the ruling and abided by it. [76 A.D.2d 604, 608 (2d Dept.1980)].

The prosecution, however, appealed the reversal to the New York Court of Appeals. That court held that, because defense counsel did not object to the ban when it was originally imposed on the morning of June 14 but objected for the first time on June 15, the Appellate Division had no authority to reverse the conviction "on the law,"[1] and vacated the reversal.

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[1] "On the law" is a term of art and refers to one of the two bases upon which New York's intermediate appellate courts

(*footnote continued on following page*)

This was the first and only time the New York Court of Appeals had declined to reach the merits of a Sixth Amendment claim for inadequate preservation. The court recognized that it was departing from its own long line of precedent which theretofore had *not* required contemporaneous objection to preserve a Sixth Amendment claim, and offered the following basis for distinction:

> The fact of counsel's presence here at the time of the trespass on defendant's right to his assistance distinguishes this case from *People v. Arthur* (22 N.Y.2d 325) and *People v. Felder* (47 N.Y.2d 287) [54 N.Y.2d at 112].

Because the Appellate Division's opinion did not discretely and separately address the bans of June 14 and June 15, the Court of Appeals remitted the case to the Appellate Division for reconsideration. The Court of Appeals expressed no view on the merits of either the June 14 or the June 15 ban. [54 N.Y.2d 106 (1981)]

Upon the remand ordered by the Court of Appeals, the Appellate Division ruled, over a vigorous dissent, that the June 15 ban—as to which timely objection was raised—was of too limited duration to constitute a Sixth Amendment violation; and, as for the June 14 ban, the Appellate

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(footnote continued from preceding page)

(*e.g.*, the Appellate Divisions) are authorized to reverse convictions. A reversal "on the law" [N.Y.C.P.L. § 470.15(4)(a)] is a reversal predicated upon a ruling or instruction as to which "a protest thereto was registered, by the party claiming error, at the time of such ruling . . . or at any subsequent time when the court had an opportunity of effectively changing the same" [N.Y.C.P.L. § 470.05(2)]. An intermediate appellate court, however, may reverse a conviction even if the issue raised on appeal has not been preserved as an "on-the-law" issue, but that residual authority to reverse is a matter of "discretion" and "the interests of justice" [N.Y.C.P.L. § 470.15(6)(a)]. With certain traditional exceptions, the Court of Appeals has no "discretionary" or "interests of justice" power, and typically will not consider the merits of any issue not preserved as a "law" issue [N.Y.C.P.L. §§ 470.35(1); 470.05(2)].

Division declined to exercise its discretion to reverse in the interests of justice [88 A.D.2d 622]. The conviction was thus affirmed.

Petitioner then appealed to the New York Court of Appeals. Having already determined on the prior appeal that the June 14 ban was not preserved as a "law" issue for the Court of Appeals, that court confined its ruling to the merits of the June 15 ban, and affirmed the conviction for substantially the same reasons that the Appellate Division had offered [58 N.Y.2d 904 (1983)].

D. The Instant Habeas Corpus Action

Petitioner's habeas corpus action asserted the same Sixth Amendment violations emanating from the trial judge's bans on attorney-client consultations beginning on June 14 and continuing overnight until proceedings were well under way on June 15. He urged the district court to reach the merits of the June 14 ban notwithstanding the New York Court of Appeals' refusal to do so for lack of contemporaneous objection, arguing that that Court's ruling was not an "adequate" ground to bar habeas review of the merits because a contemporaneous objection had never before or since been required to preserve a Sixth Amendment claim.

The district court denied relief. The court found that review of the merits of the June 14 ban was procedurally barred by the New York Court of Appeals' refusal to reach the merits, concluding that it was predicated on an adequate state ground and deciding that it was "not irrational" for the New York Court of Appeals to distinguish petitioner's case from the otherwise unbroken line of cases where the court had routinely reached the merits of a Sixth Amendment claim even in the absence of a contemporaneous objection (14a).

As for the June 15 ban, the district court reached the merits and ruled that no constitutional violation had occurred, as that day's ban lasted only an hour or so while

petitioner was still undergoing cross-examination, and any matters could have been discussed at the close of cross-examination (17a).

Petitioner then appealed to the Court of Appeals for the Second Circuit, which, by summary order, affirmed denial of the writ "for the reasons stated" by the district court [927 F.2d 594 (table)] (19a).

REASONS FOR GRANTING THE WRIT

I. The ruling below, by trivializing the concept of "adequate" state grounds into "not irrational" state grounds, allows state courts to immunize federal constitutional issues from federal habeas review by creating *ad hoc* procedural rules whose departure from previously announced precedent is not justified by furtherance of legitimate state interests.

An examination of right-to-counsel decisions rendered over the years by New York's highest court—the Court of Appeals—yields a remarkable conclusion: except for its ruling in petitioner's appeal [54 N.Y.2d 106, 112-113], the New York Court of Appeals has never announced or applied a contemporaneous-objection rule to bar consideration of a right-to-counsel claim.

Indeed, in a long line of cases, decided over a period of more than 20 years, the Court of Appeals has taken pains to announce quite the contrary: that the normal contemporaneous-objection rule does *not* foreclose Court of Appeals review of a right-to-counsel claim. The policy was set in *People v. Arthur*, 22 N.Y.2d 325 (1966); there, the defendant had made no objection to the admissibility of a confession, and raised his right-to-counsel theory of suppression for the first time on appeal. The Court of Appeals held that "the failure to object to the admissions on right to counsel grounds is not fatal since we are

concerned with the deprivation of a fundamental constitutional right" [22 N.Y.2d at 329].[2]

Perhaps no case better illustrates just how irrelevant a contemporaneous-objection rule is to the consideration of a right-to-counsel claim in New York than *People v. Carmine A.*, 53 N.Y.2d 816 (1981). Deciding the case only six months before deciding petitioner's appeal, the Court of Appeals reached the merits of a right-to-counsel claim which was not only not preserved at the trial level, but the issue was not raised in the briefs filed either at the Appellate Division or at the Court of Appeals. The Court of Appeals thus reached the right-to-counsel issue *sua sponte*:

> Thus, defendant invoked his right to counsel prior to the making of the statement sought to be suppressed. Though his right to counsel was neither preserved nor argued to the courts below or in the briefs to this court, the right is, as we made clear in People v. Ermo, so fundamental that a defendant's failure to raise the contention does not foreclose our reaching it. (citations omitted) *Carmine A., supra*, 53 N.Y.2d at 818.[3]

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[2] The Court of Appeals continued to follow and apply the *Arthur* approach that no contemporaneous right-to-counsel objection was required to preserve that kind of issue for Court of Appeals review on the next occasions where a failure to properly object arose. Thus, in 1979 alone, the Court of Appeals twice reached the merits of a right-to-counsel claim despite inadequate preservation of that issue, and expressly held, citing *Arthur*, that inadequate preservation of the issue was no bar to a ruling on the merits [*People v. Ermo*, 47 N.Y.2d 863, 865 (1979); *People v. Dean*, 47 N.Y.2d 967, 968 (1979)]. This pattern continued unbroken in *People v. Samuels*, 49 N.Y.2d 218 (1980). *People v. Cullen*, 50 N.Y.2d 168, 174 (1980).

[3] On the same day it decided *Carmine A.*, the Court of Appeals again announced in a separate case that normal preservation rules do not apply to right-to-counsel issues, and that all that is required for a ruling on the merits is a factual record presenting the gravamen of the claim [*People v. Banks*, 53 N.Y.2d 819 (1981)], a ruling it reiterated in *People v. Charleston*, 54 N.Y.2d 622, 623 (1981).

Only four months later (October 29, 1981), the Court of Appeals issued its decision in petitioner's case, in which it departed from its own precedents to fault petitioner for imperfectly preserving his right-to-counsel claim and to refuse reaching the merits of his claim [54 N.Y.2d at 112-13].

Then, as if to prove that its ruling in petitioner's case had been an aberration, the Court of Appeals—at its very next opportunity to address the issue—once again announced that normal preservation rules do not apply to right-to-counsel claims (*People v. Sanders*, 56 N.Y.2d 51, 66 (1982), a trend which continues unabated to this day.[4]

Indeed, in one of its most recent cases in the right-to-counsel area, the Court of Appeals decided *People v. Hilliard*, 73 N.Y.2d 584 (1989). *Hilliard* involved a claim identical to petitioner's; the judge at arraignment forbade attorney-client consultations for a period of 30 days following arraignment. Although not reflected in the Court's opinion, the record on appeal shows that no objection was raised to the ban until six months later.[5] The Court reached the merits anyway.

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[4] *Sanders* was followed only a month later by *People v. Ricco*, 56 N.Y.2d 320, 326 (1982), another case reaching the merits, citing *Ermo*, *Samuels*, and *Carmine A.*, but ignoring the decision in petitioner's appeal, handed down just eight months earlier. The previous trend, interrupted *only* by the ruling in petitioner's case, continued unabated in *People v. Kinchen*, 60 N.Y.2d 772, 773 (1983) and *People v. Ahmed*, 66 N.Y.2d 307, 310 (1985). In *Ahmed*, which did not itself involve a right-to-counsel issue, the Court of Appeals took the opportunity to review and restate its position on issue-preservation requirements for a variety of claims, and again stated that while virtually all issues require proper and timely objection, right-to-counsel claims were among the select few that did not (66 N.Y.2d at 310).

[5] The arraignment at which the attorney/client ban was imposed was on August 7, 1985; counsel registered no complaint until February 26, 1986. [Hilliard's Appendix at pp.A23-A32].

The ruling below thus implicates the principle of "adequacy" in two distinct, albeit related, ways. First, the rule New York departed from its own precedent to apply *only* to petitioner's case, and not known to him or his attorney at the time of trial, sprung a retroactive trap on the unwary. Second, New York's aberrational departure casts doubt on the 'legitimacy' of the state ground invoked: given New York's historical appellate tolerance of failures to object to Sixth Amendment violations, one wonders what "legitimate" state interest suddenly popped up to differentiate petitioner's case from any of the eight prior cases (or, for that matter, the four subsequent cases) announcing that tolerance.

The New York Court of Appeals was aware that it was departing from its own precedent and offered a ground of distinction; though later uncritically accepted by the habeas courts, the ground offered does nothing to palliate the concerns embodied by notions of "adequacy." The distinction is specious, as it announces a difference between two procedural settings which are without meaningful difference in terms of the legitimate interests to be served by a contemporaneous-objection rule.

The first procedural setting—the one established by *Arthur* and which normally ignores counsel's failure to raise timely and pertinent objection—involves a pre-trial motion to suppress a statement, but where counsel neglects to seek suppression on right-to-counsel grounds; the actual violation of the defendant's counsel right, of course, occurred earlier at the stationhouse, and the suppression motion provides the vehicle for rectifying it. New York has a general policy requiring contemporaneous objections to enable the court to correct its error and thereby avoid needless appellate litigation, but because New York places a special value on the right to counsel, it so strongly prefers to see that right treated on the merits on appeal that it will ignore the absence of an objection (*Arthur* and its progeny) even though that absence prevented the

hearing court from correcting its incipient error and thus generated appellate litigation that otherwise might have been avoided.

The second "line" of cases (of which *Narayan* is the only member) involves the situation where the violation of the defendant's right to counsel takes place in the courtroom during an available litigation mechanism-—a proceeding in front of a judge—where a timely objection, had one been taken, could have given the judge the opportunity to correct his error and thereby avoid needless appellate litigation.

In both situations, though, counsel's failure to object undermines the very same goal of the contemporaneous-objection rule—availing an opportunity to correct incipient error in order to avoid needless appellate litigation. The *Narayan* setting does no more violence to, nor does it present any greater threat to, the goals of the contemporaneous-objection rule than the *Arthur* setting. In each instance, counsel's failure to object allows the trial court to commit error in precisely the same way, and in each instance counsel's failure to object generates the same quantity of presumably unnecessary appellate litigation.

There is thus no logical basis for applying the contemporaneous-objection rule to the mid-trial *Narayan* setting, but dispensing with its application in the pre-trial *Arthur* setting. For purposes of the goals of the contemporaneous-objection rule, then, there is no palpable difference at all between the two procedural settings, and the trumpeted distinction between them is an illusory *ipse dixit*. Indeed, the best the district court could say about this distinction was that it is "not irrational" (14a), a characterization adopted by the court of appeals' affirmance.

But the "not irrational" standard applied by the courts below trivializes the time-honored notion of "adequacy" as explicated by this Court's holdings on the subject, whose upshot is that a state court's basis for a procedural

default ruling—if it is to preclude subsequent review in a federal forum of a federal constitutional claim—must be a *principled* ruling applied in a consistent and principled manner, and not as a trap for the unwary.

Thus procedural distinctions without principled difference, though they might not have been "irrational," have not sufficed to procedurally bar consideration of the merits of a federal claim [*James v. Kentucky*, 466 U.S. 341, 348 (1984): state court's procedural distinction between "admonition" to jury vs. "instruction" to jury not adequate to bar federal review because neither "firmly established" nor "consistently applied"].

Nor have sudden or unpredictable departures from prior state decisions, though not on their face "irrational," been deemed "adequate" to bar subsequent federal review [*Ford v. Georgia*, 111 S.Ct. 850, 858 (1991): state's application of rule not in existence at time of defendant's trial; *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988): "weight of state authority" did not consistently or regularly apply procedural bar invoked against the defendant; *accord, Dugger v. Adams*, 489 U.S. 401, 410-411 n.6 (1989): procedural bar invoked against the defendant had previously been invoked in "vast majority" of prior cases].[6]

The "not irrational" framework of analysis applied by the courts below to bar petitioner's claim not only trivial-

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[6] *James, Ford*, and *Johnson* and their explication of "adequacy" in terms of whether the state's procedural bar was "firmly established" and "regularly followed" are, of course, only the most recent expositions of themes found in earlier cases, *e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964), *Hathorn v. Lovorn*, 457 U.S. 255, 262-265 (1982). While virtually all of this Court's "adequacy" cases involved either death-penalty defendants or substantive issues with racial overtones, the Court's opinions are bereft of any suggestion that scrutiny of a state court's procedural bar for "adequacy" is limited to such cases.

izes this Court's more searching analysis of the "adequacy" of state procedural bars, but it is distinctly out of step with the searching examinations of "adequacy" required by the other circuits.[7]

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[7] *Guttierrez v. Moriarty*, 922 F.2d 1464, 1471 (10 Cir.1991) [state procedural rule "not applied consistently" is not adequate to bar federal rule]; *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384 (7 Cir.1990) [even a rule of "forfeiture-unless-good-reasons" must be applied with consistency]; *Coleman v. Saffle*, 869 F.2d 1377, 1382-84 (10 Cir.1989) [state contemporaneous objection rule "inadequate" to bar federal review because not "strictly followed" and consistently applied]; *Osborn v. Shillinger*, 861 F.2d 612, 621 (10 Cir.1988) [state procedural bar not "sufficiently regularized and consistently applied" to preclude federal review of claim]; *Reynolds v. Ellingsworth*, 843 F.2d 712, 719 (3d Cir.1988) [absence of state procedural rule which governs in "unmistakable terms" and state court ruling inconsistent with other state authority does not bar federal review]; *Johnson v. Muncy*, 830 F.2d 508 (4th Cir.1987) [midstream shift in state's post-conviction issue preservation rules barring claim in state court cannot bar later review of that claim in habeas action]; *Wheat v. Thigpen*, 793 F.2d 621, 623-627 (5th Cir.1986) [same, where petitioner's case was first one to which new preservation rule was applied]; *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir.1986) (*en banc*) [state court's retroactive application of new and stricter issue preservation rule not "adequate" to bar habeas review]; *Walker v. Engle*, 703 F.2d 959, 967 (6 Cir.1983) [state procedural bar that has no foundation in the record may not bar federal habeas review]; *Kreck v. Spalding*, 703 F.2d 1108, 1117-1118 (9 Cir.1983) [state had "not expressed a clear procedural policy"]; *accord*, *Breest v. Perrin*, 655 F.2d 1, 3 (1st Cir. 1981) [100 year-old state procedural rule "clearly established at time of defendant's trial" is adequate to bar federal review].

II. *Geders v. United States* and *Perry v. Leeke* dealt with the very lengthy or very short ban on lawyer-client consultations, but neither decision offers clear guidance on how the more frequently encountered mid-length ban on consultations ought to be analyzed.

The ban on attorney-client consultations was first imposed on June 14, during petitioner's direct examination, and continued overnight. Defense counsel voiced no objection on June 14, but the following morning, prior to the jury being seated and before petitioner resumed the witness chair, defense counsel complained pointedly about the court's ban and insisted that he be allowed to speak with his client. The court refused, and petitioner then ascended the stand without being permitted to consult with his attorney.

When the court subsequently ordered a recess, defense counsel again complained about the ban on attorney-client access; at first, the judge continued the ban, but at the end of the recess the judge changed its ruling and permitted petitioner and his attorney to consult prior to resumption of cross-examination. The length of the objected-to June 15 ban on attorney-client consultations lasted from 9:35 a.m. when court opened through 10:05 a.m. when the jurors took their seats, and through some 22 pages of cross-examination, for an estimated total of about an hour.

While the length of this June 15 ban is obviously much less than the ban of June 14 which lasted a good part of the day, and ran overnight, it is still of significant constitutional dimensions. *Perry v. Leeke*, 488 U.S. 272 (1989), of course, noted that a trial judge "must have the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to ongoing

testimony" [488 U.S. at 283-84], and the Court there held that the ban on attorney-client consultation during a single 15-minute recess did not violate the Sixth Amendment:

> It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess . . . The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a *short recess* in which it is appropriate to assume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice. 488 U.S. at 284 (emphasis added).

The courts below disparaged petitioner's Sixth Amendment claim in large part because the objected-to ban on consultations lasted only about an hour (17a). The question which thus presents itself is what constitutes a "short recess" within the meaning of *Perry*.

The case law is muddled concerning bans lasting more than the 15 minutes involved in *Perry* but less than the overnight ban condemned by *Geders v. United States*, 425 U.S. 80 (1976). Although dicta in a *Perry* footnote (488 U.S. at 284.n.8) suggests that a 30-minute ban might be acceptable, one post-*Perry* case approved a ban of 75 minutes. *Wooten-Bey v. State*, 568 A.2d 16 (Md.1990). The remaining cases are all pre-*Perry*, and while many of those are cited without comment in *Perry* (488 U.S. at 277-278, n.2), there are other pre-*Perry* cases which condemned the kind of mid-length ban imposed upon petitioner and his lawyer. *E.g., Jackson v. United States*, 420 A.2d 1202 (D.C.App.1979) [lunch break]; *Stripling v. State*, 349 So.2d 187 (Fla.App.1977) [2 hours]; *Recinos v. State*, 420 So.2d 95 (Fla.App.1982) [lunch break]; *People v. Igaz*, 326 N.W.2d 420 (Mich.App.1982) [noon break]; *Comm. v. Vivian*, 231 A.2d 301 (Pa.1967) [noon break].

On this record, the judge's June 15 ban denied petitioner his Sixth Amendment right, and not simply because the hour-long June 15 ban was of longer duration than the 15-minute ban at issue in *Perry*.

Unlike the situation in *Perry*, here it is *not* appropriate to "presume that nothing but the testimony [would have been] discussed" [488 U.S. at 284] during the hour or so in question. At the time the court denied counsel's request to consult with his client, petitioner (who, the record shows, had had questions to ask) had already effectively been denied access to his attorney for approximately 24 hours. Regardless of whether his attorney objected to the June 14 ban, the fact remains that petitioner—through no direct fault of his own—had been precluded from speaking with his attorney on anything of substance for that entire period of time. That the trial judge's June 14 ban may not have been preserved for habeas review does not make the court's actions prior to counsel's June 15 objection irrelevant. Rather, this history of interference in the attorney-client relationship reinforces petitioner's claim that the relatively shorter objected-to June 15 ban violated his Sixth Amendment rights.

Against this backdrop, regardless of the hour or so duration of the objected-to June 15 ban, it is simply not reasonable to assume that petitioner and his counsel would have discussed only his testimony. Having been denied the right to speak with his attorney since he first took the stand the previous morning, petitioner needed to discuss a "variety of trial-related" matters with his attorney, a protected right under the Sixth Amendment by *Perry*, 488 U.S. at 284. *See also United States v. Cobb*, 905 F.2d 784, 791-92 (4 Cir.1990).[8]

[8] By similar compass, the other basis for the rulings below—that "any other matters could have been addressed just as fully after the cross-examination had been completed" (17a)—makes no sense at all: the same could be said for *any* mid-trial ban on

(footnote continued on following page)

In sum, then, the underpinnings of *Perry's* upholding the constitutionality of a single ban during a "short" 15-minute recess simply do not apply in petitioner's case. Here, the refusal to permit consultation between petitioner and his attorney for the immediately preceding 24 hours undermines any presumption "that nothing but the testimony [would] be discussed" when counsel demanded to do so on June 15. What is more, neither the petitioner nor the jury had assumed their places in the courtroom when counsel sought to speak with his client, and thus no disruption to ongoing proceedings was threatened. As in *Geders*, then, the judge's June 15 ban upon communication between attorney and client infringed upon the Sixth Amendment right to counsel.

But *Perry* and *Geders* address only the extreme ends of the time spectrum—"short recess" and "overnight"—of bans on attorney-client consultations while the defendant is on the stand; neither case supplies clear temporal or circumstantial guidelines with which mid-range bans on such consultations ought to be measured against Sixth Amend ment guarantees to counsel, and extant case law from other jurisdictions mirrors this confusing vacuum, which ought to be filled.

(*footnote continued from preceding page*)

attorney-client consultations, and is circular reasoning that would eviscerate both *Geders* and *Perry*, as it would mean that *no* mid-trial ban would violate the constitution so long as attorney and client were allowed to consult *eventually*. Nothing in *Geders* or *Perry* sanctions such a facile analysis of the Sixth Amendment right to consult with counsel. *See United States v. Cobb*, 905 F.2d 784, 791-92 (4 Cir.1990).

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 17, 1991
New York, NY

Order and Opinion of the United States District Court for the Eastern District of New York

Suraj NARAYAN, Petitioner,

v.

Charles SCULLY, Superintendent of Greenhaven Correctional Facility, Robert Abrams, Attorney General, New York State, and John Santucci, Queens County District Attorney, Respondents.

No. CV-89-3859.

United States District Court,
E.D. New York.

July 11, 1990.

Stanley Neustadter, New York City, for petitioner.

Stephanie Schwartz, Asst. Dist. Atty., Kew Gardens, N.Y., for respondents.

MEMORANDUM AND ORDER

GLASSER, District Judge:

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is denied in its entirety.

Petitioner was convicted, after a jury trial, of Murder in the Second Degree. He was sentenced by the Supreme Court, Queens County, to 25 years to life in prison. Petitioner appealed his conviction, and the Appellate Division reversed. *People v. Narayan*, 76 A.D.2d 604, 431 N.Y.S.2d 556 (2d Dept.1980). The Court of Appeals, however, reversed the Appellate Division, and remanded the case for further proceedings. *People v. Narayan*, 54 N.Y.2d 106, 444 N.Y.S.2d 604, 429 N.E.2d 123 (1981). Upon reconsideration, the Appellate Division affirmed Petitioner's conviction. *People v. Narayan*, 88 A.D.2d 622, 449 N.Y. S.2d 1008 (2d Dept.1982). The Court of Appeals subsequently affirmed that decision. *People v. Narayan*, 58 N.Y.2d 904, 460 N.Y.S.2d 503, 447 N.E.2d 51 (1983).

Petitioner then filed this petition, which raises only one ground. Petitioner claims that he was denied the assistance of counsel in violation of his Sixth Amendment rights.

Facts

Between 12:30 A.M. and 12:45 A.M. on December 25, 1974, Petitioner was seen entering Sandra Zahler's building in Kew Gardens, Queens, and walking towards her apartment. He was wearing a dark leather coat, and leading Ms. Zahler's dog on a leash.

At 3:20 A.M., the sounds of a fight were heard coming from Ms. Zahler's apartment. Five minutes later, her door was heard to open, and a man heard to leave by way of the stairs.

At approximately 4:00 A.M., Petitioner entered the Bonnanne Pub at 88th Street and Third Avenue in Manhattan. He was wearing a brown leather jacket, and appeared shaken, and roughed-up as though he had been in a fight. He began drinking, and remained at the Pub for some time.

At approximately 1:30 P.M. on December 26, George Boguslaw, Ms. Zahler's boyfriend, went to the apartment and opened the door with a key she had given him months before. He found her half on the couch, covered with vomit and blood, and called the police. The police arrived to find the apartment spattered with blood. An autopsy revealed that Ms. Zahler had been bludgeoned to death.

After the police arrested Petitioner, they searched his apartment and found a brown leather jacket stained with blood and other grayish and whitish matter of human origin, as well as blood-stained shoes. Tests revealed that the blood was type A; Petitioner's blood was type B. Fingerprints matching Petitioner's were found in Ms. Zahler's apartment, on the kitchen wall and on a bottle of liquor found on her stove.

Petitioner testified that he had left Ms. Zahler's apartment at 12:05 A.M., and did not return until 5:00 A.M. the next day (December 26). He was wearing his leather jacket. He knocked on Ms. Zahler's door, and, getting no answer, turned the

knob, finding the door unlocked. He entered the apartment and found Ms. Zahler on the couch. He picked her up and tried to revive her, getting blood on his jacket. He ran out of the building, by way of the stairs. He called 911 from a phone booth on Queens Boulevard, but panicked and hung up when asked his name.

Trial

On June 14th, Petitioner took the stand in his own defense. During his direct examination, the trial judge declared a brief recess, and (out of the presence of the jury) admonished Petitioner and his attorney as follows:

[to defense attorney Lombardino] "Don't talk to him about his testimony." [to Petitioner] "Don't talk to Mr. Lombardino about your testimony, you understand that?"

Petitioner resumed the stand after the recess. When the judge declared a lunch recess, he stated (out of the presence of the jury):

"The defendant is remanded. Don't discuss your testimony."

Cross examination began after lunch, and continued throughout the rest of the day. Finally, the prosecutor asked Petitioner:

"Do you recall speaking with somebody in Bonanne's Bar and telling him that you had killed somebody on Christmas Eve?"

Petitioner's attorney objected to the question, and the judge called a recess until the next day, reserving ruling on the objection. The trial judge made no statements to Petitioner or his attorney concerning their ability to talk to each other during the overnight recess.

The next day (June 15th), after the judge heard argument on the objection and decided that the question was proper, the following colloquy occurred:

Mr. Lombardino: "I would like to place something on the record. I have a legal point to make."

Prosecutor: "May we have it at sidebar?"

The Court: "He is on the stand."

Mr. Lombardino: "May I say an attorney has the right to speak to his client at all stages of the proceedings."

The Court: "Not while he's testifying."

Mr. Lombardino: "I respectfully except and I respectfully submit I am being denied the right to consult with my—the defendant is being denied the right to consult with counsel."

The Court: "Step up."

(Defendant resumed stand.)

Court Officer: "You are still under oath, Mr. Narayan."

The Court: "All right, no further applications. Bring in the jury please."

When cross examination resumed, the prosecutor pursued the following line of inquiry:

Prosecutor: "Mr. Narayan, after you left court yesterday afternoon, did you have a conversation with your lawyer?"

Mr. Lombardino: "I object."

The Court: "Overruled."

Mr. Narayan: "Yes, sir."

Prosecutor: "How long did you speak with him?"

Mr. Lombardino: "I object."

The Court: "Overruled."

Mr. Narayan: "A few minutes."

Later on during cross examination, the following exchange took place:

Prosecutor: "You discussed this case with your lawyer?"

Mr. Narayan: "My lawyer told me to."

Prosecutor: "To ask me that question?"

Mr. Narayan: "Be polite and relax."

Cross-examination continued, until the trial judge called a 15 minute recess. After the jury left, the following exchange occurred:

Mr. Lombardino: "Again, I would like to have the Court's permission to speak with my client during the recess."

The Court: "Overruled."

Mr. Lombardino: "Respectfully except. Let the record indicate he's still on cross and he's being denied an opportunity to speak with me during the recess."

The Court: "Let the record so indicate."

Shortly after the recess, at the end of a sidebar concerning another issue, the following exchange took place:

The Court: "You made an application. You want to talk to your client? While I have these rulings to make, and I reserve decision last night on a question of whether the district attorney was going to—withdrawn—the district attorney had a basis for asking the questions. I said you can't talk to him. While I was researching my decision, while this questioning was going on, I said you can't talk to him. I think I am right. Now, I have made my determination here you can talk to him. If you want to talk to him now before he gets back on the stand, you want to talk to him?"

Mr. Lombardino: "He has some questions he wanted to ask me."

The Court: "Go ahead. I want the record to reflect that."

On re-direct, Petitioner was examined as follows:

Mr. Lombardino: "Bobby, did you speak with me last night?"

Mr. Narayan: "Yes, sir."

Mr. Lombardino: "At the end of the court day, did you speak to me after court was over?"

Mr. Narayan: "Not business."

Mr. Lombardino: "All right. Now were you unable to speak to me?"

Prosecutor: "Objection."

The Court: "Overruled."

Mr. Narayan "Yes, sir, because—"

Mr. Lombardino: "Why were you unable to speak to me?"

Mr. Narayan: "[The] court ordered no conversation regarding my testimony."

Discussion

I. The Night of June 14th–15th

"[A]n adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show 'cause'

for the default and 'prejudice attributable thereto.' " *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 2043, 103 L.Ed.2d 308 (1989). As to the June 14th–15th "ban," the New York Court of Appeals " 'clearly and expressly' stat[ed] that its judgment [rejecting Petitioner's claim] rest[ed] on a state procedural bar." *Id.* Petitioner failed to object to the "ban" on the 14th, and has made no showing of "cause" for the failure to raise a contemporaneous objection.

Petitioner argues that this court may disregard the procedural bar on the ground that it is not "strictly and regularly followed" by the New York courts. *Hathorn v. Lovorn*, 457 U.S. 255, 262–63, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982). Petitioner points to a long line of New York cases holding that a claim of the denial of the right to counsel may be considered upon appeal despite a lack of objection at trial. *See, e.g., People v. Arthur*, 22 N.Y.2d 325, 292 N.Y.S.2d 663, 239 N.E.2d 537 (1968); *People v. Ermo*, 47 N.Y.2d 863, 419 N.Y. S.2d 65, 392 N.E.2d 1248 (1979).

The Court of Appeals clearly distinguished that line of cases in its opinion. In the instant case, unlike those presented by Petitioner, the alleged deprivation took place at trial, when Petitioner's attorney was present and fully able to register any objection he deemed appropriate. Thus the Court stated that:

> "[w]ithout in any way depreciating the stature of the constitutionally protected right of a criminal defendant effectively to confer with counsel and not to be deprived of the right for any substantial period of time (*Geders v. United States*, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)]), we find no justification for departing from the requirement that trial court error (here interference with that right) must be brought to the court's attention by protest timely made, *at least where counsel acting on defendant's behalf is present and available to register a protest and where the error if called to the court's attentnion [sic] is readily susceptible to effective remedy.*

People v. Narayan, 54 N.Y.2d 106, 112, 444 N.Y.S.2d 604, 429 N.E.2d 123 (1981) (emphasis added).

The logic behind this distinction is readily apparent. Where the alleged deprivation of the right to counsel occurs at a time when the defendant is unrepresented, it would be absurd to require that such an unassisted party register a contemporaneous objection. Similarly, a requirement that the deprivation later be objected to at trial, when the defendant *is* represented by counsel, would not serve the end of providing the trial judge an opportunity to avoid the deprivation in the first instance.

In contrast, the instant case provides an excellent example of the values served by respecting the contemporaneous objection rule. Had Petitioner's attorney objected to the "overnight ban" on communication at the close of court on the 14th, there is every reason to expect that the trial judge would have clarified the fact that his earlier instructions were not meant to extend beyond the end of that day's session. Indeed, the fact that the trial judge repeated his instructions when calling the lunch re-

cess on June 14th suggests that he did not expect instructions given at the time a recess was called to remain in effect indefinitely. His failure to repeat the instruction at the end of the court day is therefore a further indication that he did not intend to preclude Petitioner from consulting with his attorney overnight. If, on the other hand, the trial judge *had* nevertheless clearly imposed an overnight ban in response to an objection registered at the end of the June 14th session, the question of procedural bar would never have arisen.

Petitioner's argument that *Narayan* is the only case in which the Court of Appeals has made the distinction discussed above is unpersuasive. The circumstances of this case are unusual compared to those found in the cases presented by Petitioner. It is therefore unsurprising that the Court of Appeals has not had another opportunity to rule on this precise question of law. The distinction is not irrational, however, for the reasons laid out above. Nor is *People v. Hilliard*, 73 N.Y.2d 584, 542 N.Y.S.2d 507, 540 N.E.2d 702 (1989), cited by Peti-

tioner, to the contrary. In *Hilliard*, as in the other cases pressed by Petitioner, the alleged deprivation occurred well before trial.

Finally, the court finds no merit in Petitioner's argument that the contemporaneous objection rule was not "clearly announced." *Henry v. Mississippi*, 379 U.S. 443, 448 n. 3, 85 S.Ct. 564, 567 n. 3, 13 L.Ed.2d 408 (1965). The rule is one of long standing in the New York courts. It strains belief to suggest that the failure of Petitioner's attorney to register a contemporaneous objection was prompted by his reliance on the belief that his client's right to challenge the ruling on habeas review would nonetheless be preserved.

For all of the above reasons, the court finds that Petitioner's claim, as it relates to the night of June 14th–15th, is procedurally barred.

II. June 15th

[2] Petitioner also claims that the trial judge's refusal to allow his attorney to converse with him on June 15 until the

prosecution had completed its cross examination of him violated his right to assistance of counsel. He cites *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), which held that a trial judge's refusal to allow a criminal defendant to consult with his lawyer during an overnight recess constituted a violation of the Sixth Amendment. Since *Geders*, however, the Supreme Court has decided *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), which holds that the denial of the ability to consult with an attorney during a short trial recess during the defendant's testimony does *not* violate the Sixth Amendment.

The Court distinguished *Perry* from *Geders* as follows:

> The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability

> of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess.... But in a short recess, in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

109 S.Ct. at 602.

Here, the prosecution was in the middle of Petitioner's cross examination when his attorney requested to speak with him. Once that cross examination was completed (no more than an hour, by Petitioner's own admission) the judge allowed Petitioner and his attorney to consult. The only difference between having been allowed to converse at the time Petitioner's attorney requested it and the time the trial judge allowed it would have been the ability to discuss Petitioner's testimony. Any other matters could have been addressed just as fully after the cross examination had been completed. The court therefore concludes that this case falls under *Perry* rather than

Geders. Since "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying," *Id.* at 600, no constitutional error was committed at Petitioner's trial.

III. Summary

For all of the above reasons, the petition is denied in its entirety.

SO ORDERED.

Order of the United States Court of Appeals for the Second Circuit Affirming the Judgment of the United States District Court for the Eastern District of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of January, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE J. DANIEL MAHONEY
HONORABLE ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

HONORABLE REENA RAGGI,*
District Judge.

(seal)
UNITED STATES COURT OF APPEALS
FILED
JAN 22 1991
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

SURAJ NARAYAN,

Petitioner-Appellant,

- v. -

No. 90-2371

CHARLES SCULLY, Superintendent,
Greenhaven Corectional Facility,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on the heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment of said district court be and it hereby is AFFIRMED.

* United States District Judge for the Eastern District of New York, sitting by designation.

1. We affirm for the reasons stated in the memorandum and order of the United States District Court for the Eastern District of New York, I. Leo Glasser, *Judge*, entered July 12, 1990.

/s/ E V Graafeiland

HON. ELLSWORTH A. VANGRAAFEILAND, U.S.C.J.

/s/ J. Daniel Mahoney

HON. J. DANIEL MAHONEY, U.S.C.J.

/s/ Reena Raggi

HON. REENA RAGGI, U.S.D.J.

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(2)

No. 90-1656

JUL 10 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SURAJ NARAYAN,

Petitioner,

vs.

CHARLES SCULLY, Superintendant,
Greenhaven Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether trial counsel's failure to object to the court's June 14 rulings constituted an adequate state ground for New York's rejection of the petitioner's appellate claim of a violation of his Sixth Amendment rights?

2. Whether the trial judge's two orders of June 14--which for brief periods prohibited the testifying criminal defendant and his trial counsel from conferring about the defendant's testimony, and which passed without objection by counsel--constituted violations of the defendant/petitioner's Sixth Amendment right to the assistance of counsel?

3. Whether the trial court's order of June 15, which prohibited the testifying defendant from conferring with his trial counsel about his continuing testimony--for a period of no more than an hour--constituted a violation of the defendant/petitioner's Sixth Amendment rights?

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No. 90-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SURAJ NARAYAN,

Petitioner,

vs.

CHARLES SCULLY, Superintendant,
Greenhaven Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Upon the affirmance of his conviction for murder by New York State's reviewing courts, the petitioner sought federal *habeas corpus* relief, claiming that his federal Sixth

Amendment rights had been wrongly infringed. In the courts below, and before this Court, he has raised both procedural substantive issues.

His procedural challenge attacks a ruling of the New York State Court of Appeals, which, he contends, lacked an adequate state ground for its rejection of his claim when it held that his trial lawyer's failure to object in timely fashion to the trial judge's rulings barred him from raising one of his two substantive Sixth Amendment issues, as a matter of law.*

---

* The intermediate appellate courts of New York State are authorized to review issues either "on the law" (N.Y. CPL Sec. 470.15[4][a]--when the error has been timely protested on the record below (the "contemporaneous objection rule")--or, alternatively, "in the interests of justice" (N.Y. CPL Sec. 470.15[6][a]--when the appellate issue has not been preserved by adequate objection. With few exceptions (not relevant here), the New York Court of Appeals reviews solely errors preserved by timely objection as issues of law" (N.Y. CPL Sec. 470.35[1]; N.Y. CPL Sec. 470.05[2]).

The petitioner has also raised two substantive Sixth Amendment claims, each originating in the trial court. He combines these in his argument before this Court, but for clarity's sake the two must be separately assessed.

First, he contends that the trial judge impermissibly infringed his Sixth Amendment right to the assistance of counsel by ordering him not to confer with his attorney during a period that extended through part of his testimony on June 14, and then throughout the entire night of June 14-15.

Second, he claims that the trial court further infringed his Sixth Amendment right to the assistance of counsel when, on the morning of June 15, it again refused to permit him to confer with counsel until after his cross-examination on that day had

proceeded for perhaps as long as an hour.

The United States District Court found no merit to these procedural and substantive arguments, and seriously questioned the petitioner's claim that the trial judge had imposed a night-long bar on his right to consult with his attorney during the evening of June 14-15. The United States Court of Appeals affirmed that ruling, relying upon the decision in the Eastern District, below.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The federal courts below correctly ruled that New York's Court of Appeals possessed adequate state grounds for holding that the petitioner had procedurally defaulted on his claim of a Sixth Amendment violation, when his trial attorney--who was actually

present--failed to object to court orders prohibiting consultations between attorney and client, and thus failed to preserve a substantitve Sixth Amendment claim for appeal as an "issue of law."

The petitioner's claim offers no unique issues for this Court's review, for his present contention is identical to one recently and unsuccessfully argued before this Court. The decision in the present matter is fully in harmony with the Court's holding. Therefore, this petition for a writ of certiorari should be summarily denied.

In *Dugger v. Adams,* 489 US 401 (1989), a capital case, this Court upheld Florida's rule barring appellate review of an alleged constitutional error to which trial counsel had failed to object. New York's rule in the present case--which, precisely like the rule in *Adams*, requires an attorney's

objection as a prerequisite to the preservation of the issue for appellate review--was similarly affirmed, below. In this case, as in *Adams*, the State Court of Appeals possessed adequate state grounds for its refusal to hear the defendant's claim of a Sixth Amendment violation. The New York rule is rational, has not been unfairly or improperly applied in the petitioner's case, and does not warrant this Court's review.

Here, as in *Adams*, the petitioner has also failed the meet the threshhold test for habeas corpus review: he offers no "good cause" explanation for his failure timely to object to the trial judge's actions, and hence has failed to comply with the rule of *Wainwright v. Sykes*, 433 US 72, 87 (1977). Indeed, his present petition offers this Court no excuse at all for

his absolute silence throughout the period when the error--if error there were--might have been promptly corrected by the trial judge. See, *Narayan v. Scully*, 741 F. Supp, at 380. Therefore, his request for *habeas corpus* review of the issue was properly rejected by the federal courts below. Since his petition before this Court demonstrates no good cause for his conspicuous failure to object, the petitioner cannot properly seek review of his present claim, *Sykes*, *supra*, and for this reason as well the Court should deny certiorari.

The petitioner's unexcused procedural default was properly held to constitute an independent bar to federal review of the present *habeas corpus* petition--for here, as in *Adams*, *supra*,

> the legal basis for a challenge was plainly available [to trial counsel], and it would not be

> safe to assume that the failure to object was not for tactical or other reasons that will not excuse the default in a habeas corpus proceeding.

489 U.S. at 415.

See also, *United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Issac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 US 72 (1977); *Martinez v. Harris*, 675 F.2d 51, 54-55 (2 Cir. 1982), *cert. denied*, 459 US 849 (1982); *Edward v. Jones*, 720 F.2d 751 (2 Cir. 1983). Review by way of a *habeas corpus* petition was correctly denied by the courts below because the "federal claim has not been fairly presented to the state courts." *Picard v. Connor*, 404 US 270, 275 (1971); *Wainwright v. Sykes, supra*, at 86-87.

Notwithstanding his failure to meet the threshhold requirements of *Sykes, supra*, this petitioner contends that the District Court and the Court of Appeals

for the Second Circuit erred in declining to consider the merits of the judge's June 14th rulings despite the failure of counsel to make a contemporaneous objection at trial. He complains that New York's rule does not constitute an "adequate" state ground for procedural default, and argues that with the single exception of the appellant's case, *People v. Narayan,* 54 NY2d 106 (1981), the Court of Appeals of the State of New York has consistently considered the merits of every right to counsel issue before it, nowithstanding the fact that in some of those cases the issues were not preserved at trial. Relying on *Johnson v. Mississippi,* 486 U.S. 578 (1988), and *Hathorn v. Lovorn,* 457 US 255, 262-263 (1982), petitioner contends that because the Court of Appeals has inconsistently considered the merits of similar unpreserved

right-to-counsel issues, its decision in this case amounted to an "inadequate" application of the contemporaneous objection rule, thereby subjecting the decision to federal habeas corpus review.

But the New York rule that barred appellate review "as a matter of law" of all issues to which trial counsel had not timely objected, below, was the acknowledged and well-known statutory law of the State (N.Y.CPL Sec. 470.05[2]) at the time of this petitioner's trial. That law was rationally and correctly applied to his case--and so the decision below should not now be disturbed, and certiorari should consequently be denied.

The New York courts logically require that a defendant assisted by counsel strictly comply with the well-known, announced statutory

procedure (N.Y.CPL Sec. 470.05[2]) of making objection, to preserve "as a matter of law" his claim that his Sixth Amendment rights have been violated. But those same courts accord a great procedural leeway to a defendant uncounselled at the time of the alleged violation of his Sixth Amendment rights.

The New York Court of Appeals reasons that the violation of the Sixth Amendment rights of uncounselled defendants affects so fundamental a principle that the Court will consider the merits of the Sixth Amendment claim despite the defendant's failure to preserve the issue at trial. See, *e.g.*, *People v. Arthur*, 22 NY3d 325 (1966); *People v. Ermo*, 47 NY2d 863 (1979), both of which treat claimed infringements of the defendants' rights which occurred during police questioning of the defendants, in the absence of their

counsel.

But Sixth Amendment issues raised by counselled defendants are not similarly accorded such automatic appellate review.

There is good reason for the distinction. As the Eastern District noted, below, in its review of this case, *Narayan v. Scully*, 741 F. Supp. 377 (E.D.N.Y. 1990), *affd.* 927 F.2d 994 (1991), it is entirely logical that a defendant's failure to object to the violation of his Sixth Amendment right to counsel when his own attorney actually stands mute by his side in court at the very time of the alleged violation, should be treated quite differently from a defendant's failure to object to a violation that had occurred in counsel's absence, at a time when the defendant himself could not conceivably have made a timely

objection. 741 F.Supp. at 380.

When counsel had been present at the time of the alleged violation, but had stood mute during the occurrence, the courts of New York have uniformly held that counsel had failed to preserve the right for appellate review as an issue of law. See, *People v. Narayan*, 58 NY2d 904 (1983), *People v. Margan*, 157 AD2d 64 (2d Dept. 1990).

However, when there had been no attorney available to protest an alleged violation of the defendant's rights, the New York courts have waived the "contemporaneous objection rule" and uniformly permitted an examination of the merits of the case.

These latter cases almost invariably involve statements taken from defendants held in custody in police precincts, who had allegedly been prevented from consulting with counsel

prior to the taking of their statements. Logic dictates that the law ought not twice penalize a defendant under such circumstances--first, for having succumbed to the improper action of the police, and second, for having failed to object in timely fashion to the impropriety.

These grim and oppressive factual circumstances could not be more dramatically different from those before the Court in the present case--and it is perfectly proper that the New York courts differentiate sharply in their treatment of the two. The Eastern District and the Court of Appeals for the Second Circuit, below, affirming this New York ruling, have not "trivialized" the rule of "adequate state grounds," as the petitioner suggests, but have instead recognized the validity and adequacy of the State's

distinction.

With but one exception, the cases cited by the petitioner in support of his position, treat violations of the right to counsel that occurred when counsel was not present to witness or timely protest the alleged violation.

There is absolutely no error in the New York courts' readiness as a matter of policy to preserve all such claims despite the absence of timely objection. But it is equally clear that by distinguishing the facts of *People v. Narayan,* 54 NY2d 106 (1981), from those of other right-to-counsel cases, the Court of Appeals has properly assessed the differences between these two dissimilar types of right-to-counsel issues. Contrary to the petitioner's claims, the New York court has not erred by inconsistently misapplying a single announced standard of review to two

similar types of cases. It has instead consistently applied two different standards of review to two distinctly different types of cases. See, *e.g.*, *Dugger v. Adams, supra*, 489 U.S. 401 (1989), at 410-411, n. 6 (Procedural bar "adequately" applied when in *vast majority* of cases, Florida Supreme Court faithfully and regularly applied rule of procedural default, but declined to exercise procedural bar in a few distinguishable cases.)

The sole New York case cited by petitioner wherein an attorney had actually been present and silent at his client's side when the alleged deprivation of Sixth Amendment rights occurred, was *People v. Hilliard*, 73 NY2d 584 (1989). In *Hilliard*, the judge at arraignment wrongfully instructed defense counsel not to speak with his client for a period of 30 days following

the arraignment, as a punitive measure. Appellate courts' analysis of the case does not make clear whether trial counsel had objected in timely fashion to the judge's ruling, or had remained silent. The judicial ban came to an end some two months prior to the commencement of the defendant's trial, but it sufficiently impeded the defendant's right to defend so that the New York Court of Appeals, which reached the merits of the claim, reversed his conviction and held that the defendant had been deprived of his right to counsel.

Naturally, the petitioner now contends that the *Hilliard* case constitutes an inconsistent application of New York's "contemporaneous objection rule," and seeks to show that the decision in his own case had been an abberration. But the *Hillard* case is

quite different from the present one, for several reasons: first, neither the Appellate Division nor the New York Court of Appeals discloses whether trial counsel actually made a contemporaneous objection to the ban when it was imposed.

Second, as petitioner's counsel accurately notes, on the appeal of the *Hilliard* case the People failed to raise the issue of a procedural default, and thus never argued to the Court of Appeals that the defense had failed to preserve its claim as an issue of law, pursuant to N.Y. CPL Sec. 470.05(2). (In the present matter, by sharp contrast, the issue of procedural default has been consistently argued throughout the appellate history of the case.)

Finally, the federal courts below, deciding this petitioner's *habeas corpus*

claim, correctly distinguished *Hilliard* from the instant case, noting that the deprivation of counsel in *Hilliard* occurred not at trial, but well before it.

Because, for one reason or another, preservation was never raised as an issue in *Hilliard*, that case is quite different from the present one. It differs, too, because the deprivation of counsel in the *Hilliard* case occurred during a lengthy period, and inhibited the defendant's ability to prepare for trial--whereas the occurrence here was of brief duration. On all of these points, the *Hilliard* case is clearly distinguishable from the situation presented here.

The New York courts correctly held that this defendant, assisted by able counsel at trial, was procedurally barred from pursuing his claim of a

Sixth Amendment violation "as a matter of law." The federal courts, reviewing the petitioner's *habeas corpus* claim, correctly found this ruling based upon an adequate state ground, and properly refused to grant a review of the matter on the merits.

This Court should not grant certiorari.

2. The petitioner's Sixth Amendment rights were not violated by the court's orders of June 14, which only briefly prevented conversation between the attorney and his testifying defendant, on matters pertaining to the defendant's testimony.

In his argument before this Court, the petitioner does not directly attack the trial judge's two rulings of June 14, which for brief periods barred conversation between attorney and client on matters pertaining to the

defendant/petitioner's testimony while the defendant/petitioner was on the witness stand. Instead of directly addressing this underlying substantive Sixth Amendment claim, the petitioner subsumes all of his argument treating the events of June 14, under the procedural issue discussed *supra*, in Part 1, and the substantive argument discussed *infra*, in Part 3..

Nonetheless, in his statement of facts, he does curiously assert a substantive Sixth Amendment claim, based upon the trial court's orders of June 14. In that Statement (at 2), he protests that the judge explicitly prevented him from conversing with his trial lawyer throughout much of his testimony on June 14, and throughout the night of June 14-15. But this statement is inaccurate.

Instead of protesting that the

trial judge's two rulings during that day constituted a *de facto* overnight ban, the petitioner improperly states that the court had also issued a third ban, supposedly imposed directly upon him at the close of testimony at the conclusion of June 14--a ban that lasted throughout the night, and prevented him from conversing with his attorney throughout that period. (Statement of Facts, at 2.) But no such direct order was ever issued by the trial judge. The petitioner has misstated the facts of the case before this Court.*

* Insofar as counsel purports to rely on the findings of fact made by New York's Appellate Division, in this matter, People v. Narayan, 76 AD2d 606 (2d Dept. 1980), he is still wildly inaccurate. The Appellate Division in that decision merely inferred the existence of an overnight ban after its examination of the court's orders and statements on June 14 and 15. The Appellate Division never found as fact --as does petitioner, erroneously, here--that there had been an explicit order issued at the conclusion of the day, that prevented petitioner from speaking with counsel.

Contrary to the petitioner's false assertion (Statement of the Case, at 2), the trial judge never explicitly admonished him to refrain from consulting with his attorney at the conclusion of testimony on June 14-15. Nor does petitioner's assessment of the facts comport with the findings of the Eastern District, below, 741 F.Supp. at 380--which casts serious doubt upon the claim of an "overnight ban," and absolutely refutes the petitioner's assertion that there had been an order specifically directed at him, at the conclusion of his testimony on June 14, which prevented him from conversing overnight with his attorney.

What actually occurred on June 14, and what counsel failed to protest, was the issuance of two separate orders by the trial judge, each imposed at the

commencement of a brief break in testimony; each enjoining the defendant from discussing his testimony with his lawyer during that brief period. Neither the petitioner nor his attorney sought to converse during these breaks, and of course counsel never objected to these instructions. In view of this Court's recent decision in *Perry v. Leeke,* 488 U.S. 272 (1989), it is quite clear that the trial court acted within its lawful discretion in issuing those admonitions.

It is clear from *Perry* that a trial judge possesses the discretion to preclude a defendant who is in the midst of testifying, from talking with anyone during a short recess. Therefore, in the present case, the trial court's initial instruction--that petitioner not discuss "his testimony" with his attorney--given during the first short

recess on June 14th, was entirely appropriate.

Additionally, the trial court was justified in renewing that instruction just before the luncheon recess, because the petitioner had at that point just completed his direct testimony, and cross-examination was to commence after lunch. See *Perry*, 109 S.Ct. at 601.

These two brief prohibitions present quite a different appearance from the supposed "overnight ban" presumed by the petitioner. The unquestioned facts below at trial on June 14 were far closer to those of the *Perry* case, *supra*, than the petitioner is willing to admit. These facts were also quite different from those of *Geders v. United States*, 425 U.S. 80 (1976).

Moreover, it is clear from the cross-examination that ensued on the

following day, that counsel had actually conferred with his client during the evening recess, and that according to the petitioner himself, there had been "Nothing to discuss except he told me to relax and be calm and come to court." (Trial record at 2112).

It is therefore apparent that neither the petitioner nor his attorney felt the existence of a ban that lasted throughout the overnight recess between June 14th and June 15th. The two had in fact conversed during that overnight recess, and, furthermore, had found nothing of consequence to discuss. There was consequently no reversible error, here. See, *Stubbs v. Bordenkircher*, 689 F.2d 1205, 1306-1207 (4 Cir. 1982), *cert. denied,* 461 U.S. 907 (1983), wherein the denial of access to counsel during the luncheon recess while the defendant was on the stand,

was held constitutionally impermissible, but the reviewing courts found no demonstrated deprivation of the right to counsel, because there had been no showing that the defendant desired to consult with his attorney and would have done so but for the restriction. See also, *People v. Redman*, 657 F.2d 21, 22-25 (3 Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982) which found no deprivation of the right to counsel resulting from an order that barred the defendant from discussing on-going testimony with anyone during the overnight recess, because there had been no objecion to the order, and no showing that the defendant would have conferred with counsel but for the order.

The facts of the supposed "overnight ban" upon which the petitioner rests his procedural claim (see Part 1, *supra*), thus prove far more

modest than the defendant's extravagant assertions, and lead to a quite different constitutional assessment of the facts. These events surely do not make out a clear-cut *Geders* violation, and, in view of this Court's recent ruling in *Perry v. Leeke, supra,* do not amount to any Sixth Amendment violation whatsoever.

The defendant surely should not be granted certiorari upon orders of the trial judge that do not in fact violate his Sixth Amendment right to counsel.

3. The Sixth Amendment and the Order of June 15.

The trial court's ruling on the morning of June 15, which barred conversation between the defendant and his counsel, comports perfectly with this Court's recent ruling in *Perry v. Leake, supra*, and therefore requires no further examination by this Court.

Denial of a writ of certiorari is appropriate in this case because the sole substantive Sixth Amendment issue raised by this petitioner falls squarely within *Perry v. Leeke*. Assessing the issue as it pertains to this case, the Court would not make new law, but merely re-assert the principles already fully announced in *Perry*.

The defendant in his argument improperly assumes facts not evident in the record below when he informs this Court that the supposed overnight ban of June 14 (see Part 2, *supra*), continued into June 15th. He bases most of his ensuing argument on this factual assumption, and seeks this Court's intervention to rectify the supposed error that resulted from a ban imposed on June 14, and not lifted until the trial judge eventually reversed his rulings on the morning of June 15.

The actual length of time during which counsel and client were prevented from consulting with one another on June 15 extended at most for one hour. It is to be remembered that, according to the defendant/petitioner's own repeated testimony on June 15, he had conferred with his attorney during the overnight recess (see Part 2, *supra*). It was consequently appropriate for the trial judge to have assumed that "a variety of trial-related matters" unconnected with the ongoing testimony had already been discussed by counsel and client, and "that nothing but the testimony [would have been] discussed" [*Perry v. Leeke*, 488 U.S. at 284] during the hour or less in question during the June 15 ban.

Perry, of course, asserts the trial judge's discretionary right to impose a ban upon such conversations while the defendant/witness is on the stand. The

trial judge below acted well within the power granted him by *Perry*, when imposing this order. Petitioner himself cites to one case that ensued after *Perry*, wherein a 75-minute ban on discussions between attorney and testifying defendant was affirmed despite claims that this procedure violated the Sixth Amendment: *Wooten-Bey v. State*, 568 A.2d 16 (Md. 1990).

The defendant's citation to *United States v. Cobb*, 905 F.2d 784, 791-92 (4 Cir. 1990), is unavailing, for that case treated the clear-cut imposition of a weekend-long bar on lawyer and defendant, which prevented all conversation about the on-going testimony. The error of the judge's ruling was exacerbated when it became evident that the defendant had complied with the order by refraining from all

conversation with his lawyer during that period. It is therefore not surprising that a Circuit Court of Appeals would find such a ruling an improper violation of *Geders* and of *Perry*.

The present case bears no vague resemblance to *Cobb*. Herein, the defendant/petitioner, in his argument before this Court, relies upon a supposed, explicit overnight ban that was never directly imposed upon him--and then attempts to extend that ban's power until the moment when counsel's eventual objection on the following day, and the trial judge's ensuing ruling, raised it. But the petitioner has wrongly elided his July 14 and July 15 claims, in his present argument. He attempts to bootstrap the merits of the unpreserved June 14th bans onto his arguments treating the preserved June 15th ban. This is clearly improper, for the

petitioner should not be permitted to sidestep the consequences of his procedural default, as well as his failure on appeal to establish "cause" for that default, by adding the merits of his unpreserved June 14th claims onto his June 15th claim. This Court should not grant certiorari in the present matter, which is governed entirely by *Perry, supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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